United States Court of Appeals
For the First Circuit

No. 03-2415

SAMANTHA J. COMFORT, ETC., ET AL.,
Plaintiffs, Appellants,

v.

LYNN SCHOOL COMMITTEE ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nancy Gertner, U.S. District Judge]

Before

Selya, Dyk* and Howard,

Circuit Judges.

Michael Williams, with whom Robert J. Roughsedge, Chester Darling, and Citizens for the Preservation of Constitutional Rights were on brief, for plaintiffs.

Sharon L. Browne on brief for Pacific Legal Found., amicus curiae.

Richard W. Cole, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, and John R. Hitt, Assistant Attorney General, were on brief, for state defendants.

John C. Mihos, with whom James P. Lamanna, Assistant City Solicitor, was on consolidated brief for municipal defendants.

Edward J. Barshak and Sugarman, Rogers, Barshak & Cohen, P.C. on brief for Asian-Am. Lawyers Ass'n of Mass., Boston Bar Ass'n, Community Change, Inc., Fair Housing Center of Greater Boston, Jewish Alliance for Law and Social Action, New Engl. Area Conf. of the NAACP, and Greater Boston Civil Rights Coalition, amici curiae.

*Of the Federal Circuit, sitting by designation.

Patricia A. Brannan, Maree Sneed, and Hogan & Hartson LLP on brief for Council of the Great City Schools, Am. Ass'n of Sch. Adm'rs., Nat'l Ass'n of Secondary Sch. Principals, Nat'l Educ. Ass'n, Nat'l Sch. Bds. Ass'n, and Public Educ. Network, amici curiae.

Nathalie F.P. Gilfoyle, General Counsel, Lindsay Childress-Beatty, Deputy General Counsel, David W. Ogden, and Wilmer Cutler Pickering Hale and Dorr LLP on brief for Am. Psychological Ass'n, amicus curiae.

Theodore M. Shaw, Director-Counsel, Norman J. Chachkin, and Chin Quang Le on brief for Northshore Branch of the NAACP, NAACP Legal Defense & Educ. Fund, Inc., Lawyers' Comm. for Civil Rights of the Boston Bar Ass'n., and various individuals, amici curiae.

Donna Brewer MacKenna and Casner & Edwards, LLP on brief for Lynn Bus. Educ. Found. and Lynn Bus. P'ship, Inc., amici curiae.

Thomas Miller, Attorney General (Iowa), Eliot Spitzer, Attorney General, Caitlin J. Halligan, Solicitor General, Michelle Aronowitz, Deputy Solicitor General, Natalie R. Williams, Deputy Bureau Chief, and Hilary B. Klein, Assistant Attorney General (New York), G. Steven Rowe, Attorney General (Maine), and Mark L. Shurtleff, Attorney General (Utah), on brief for States of Iowa, New York, Maine, and Utah, amici curiae.

Thomas J. Henderson, Derek Black, Harris J. Yale, Bernadette McCann Ezring, Samantha G. Fisherman, Virginia Johnson, and Weil, Gotshal & Manges LLP on brief for Lawyers' Comm. for Civil Rights Under Law, amicus curiae.

David B. Broughel and Day, Berry & Howard LLP on brief for Mass. Coalition for Equitable Educ., Mass. Teachers Ass'n, Mass. Fed'n of Teachers, Mass. Ass'n of Sch. Superintendents, Metro. Council for Educ. Opportunity, Inc., Center for Law and Educ., Citizens for Pub. Sch., Mass. Ass'n of Hispanic Attorneys, League of Women Voters of Mass., Mass. Law Reform Inst., Alliance for High Standards NOT High Stakes, Schott Center for Public and Early Educ., Nat'l Center for Fair & Open Testing, and Progressive Jewish Alliance, amici curiae.

Angelo N. Ancheta on brief for Civil Rights Project at Harvard Univ., amicus curiae.

October 20, 2004

SELYA, Circuit Judge. This appeal requires us to review certain features of a voluntary plan for scholastic improvement and elimination of racial isolation adopted in Lynn, Massachusetts (the Lynn Plan). Under that arrangement, each student is entitled to attend his or her neighborhood school from kindergarten through the twelfth grade (K-12). Those assignments are race-neutral. The rub, however, is that if a student wishes to transfer to a non-neighborhood school, the school system restricts the right of transfer based on the student's race and the racial makeup of the transferor and transferee schools.

Parents whose children were denied the right to transfer on race-conscious grounds challenged the transfer provisions of the Lynn Plan, claiming, inter alia, that those provisions violate rights secured to them under the Equal Protection Clause of the United States Constitution. The district court rejected the parents' asseverational array (including their equal protection challenge), and this appeal ensued.

To resolve the equal protection issue, we turn to the Supreme Court's recent decisions in Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003). We remain cognizant, however, that the factual backdrop for our inquiry differs in two critical respects: first, the Lynn Plan operates at the K-12 level, not at the university level; and second, the Lynn Plan restricts voluntary transfers, not competitive admissions.

After careful perscrutation of an amplitudinous record, we conclude that the Lynn School Committee has made a persuasive case that racial diversity in K-12 education may produce real educational benefits. Nevertheless, we conclude that the Lynn Plan as currently conceived transgresses the Equal Protection Clause because it is not narrowly tailored to meet the school system's asserted interest.

Other issues lurk at the periphery of this appeal. We treat the federal statutory claim mounted by the plaintiffs pursuant to 42 U.S.C. § 1983 as congruent with their equal protection claim, but treat their other federal statutory claims as mooted by our equal protection determination. We dismiss for want of standing the plaintiffs' challenge to the state law that prompted the adoption of the Lynn Plan. That leaves the plaintiffs' insistence that the district judge should have disqualified herself from presiding in this matter. Because this case will require further proceedings below, we address that issue and hold that recusal was not obligatory. In the end, we reverse the ruling sanctioning the disputed transfer provisions, vacate the judgment, affirm the district court's denial of the plaintiffs' motion for recusal, and remand for further proceedings consistent with this opinion. On remand, we direct the district court to enter a revised judgment granting, inter alia, appropriate declaratory and injunctive relief to the plaintiffs.

I. BACKGROUND

The district court has laid out the relevant facts in exquisite detail. See Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003) (Comfort IV); Comfort v. Lynn Sch. Comm., 150 F. Supp. 2d 285 (D. Mass. 2001) (Comfort III); Comfort v. Lynn Sch. Comm., 131 F. Supp. 2d 253 (D. Mass. 2001) (Comfort II); Comfort v. Lynn Sch. Comm., 100 F. Supp. 2d 57 (D. Mass. 2000) (Comfort I). We rehearse only those facts necessary to put this appeal into proper perspective.

We begin with a brief overview of the historical antecedents of the Lynn Plan. We then limn the contours of the Plan and describe how it operates on the ground. Next, we explore the Massachusetts racial imbalance law and its relation to the Lynn Plan. Finally, we trace the evolution of the instant litigation.

A. Historical Antecedents.

The district court made a series of findings, largely unchallenged, regarding the experiential predicate for the Lynn Plan. Comfort IV, 283 F. Supp. 2d at 344-47. We provide a brief synopsis.

Lynn is the ninth largest city in Massachusetts, with a population of approximately 89,000. At all times relevant hereto, its school system has followed a neighborhood-school-centered paradigm, that entitles pupils to attend their local schools as a matter of right. By the mid-1970s, several of Lynn's schools were

experiencing significant racial imbalance. In 1977, for example, the Washington Community Elementary School had a non-white student population of 57% (more than six times the non-white percentage in the school system as a whole). Predominantly minority schools suffered disproportionately from resource shortages, overcrowding, discipline problems, and teacher apathy. There were also indications of a high degree of racial tension throughout the system.

In an effort to combat these problems, Lynn established its first magnet school in 1979. At the same time, it inaugurated a voluntary transfer program aimed at attracting white students to that school (which apparently was located in a predominantly non-white area). The magnet program grew in fits and starts. It produced only modest success in alleviating racial imbalance.

In the meantime, demographics were shifting. Between 1980 and 2000, Lynn was transformed from 93% white to 63% white, with the school-age population outpacing the trend (that population had become more than half non-white by 2000). In the same time frame, the city became more racially segregated; increasingly, whites clustered in the northern and western areas and non-whites populated the south central region.

These residential patterns heightened the racial imbalance of Lynn's schools. By 1987, seven of eighteen elementary schools had white enrollments of 90% or more. Four others had

predominantly non-white student bodies. Lynn responded by developing a plan to launch ten magnet schools,[1] but municipal leaders remained concerned that the magnet school program, on its own, would not suffice to combat growing racial imbalance. In September of 1989, the School Committee announced a new approach: the Lynn Plan. That plan, as amended in 1990 and again in 1999, is described below.

B. The Lynn Plan.

The defendants describe the Lynn Plan as a voluntary plan for school improvement and the elimination of minority isolation. Its school assignment provisions revolve around the time-honored concept of neighborhood schools. Under that concept, each pupil is guaranteed an assignment to his or her neighborhood school. Race is taken into account only when a student seeks to transfer (or to be assigned) to a school other than his or her neighborhood school.

Lynn operates eighteen elementary schools (six of which are magnet schools), four middle schools (three of which have

[1]This plan was aspirational, and the total number of magnet schools in Lynn has yet to reach the target figure. In all events, Lynn's use of the term "magnet school" differs from the conventional definition of that term. Ordinarily, the term denotes an elite public school with competitive admissions policies. In Lynn's lexicon, however, the term refers to a school that features an educational theme beyond the standard scholastic curriculum, designed partially to entice cross-neighborhood transfers. Despite this specialization, however, the parties have stipulated that "the education provided . . . in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum."

magnet programs), and three high schools.[2] In the 2001-2002 school year, 15,444 students attended the Lynn public schools. Out of this group, approximately 42% were white, 15% Black/African-American, 29% Hispanic, and 14% Asian (for a total "minority" population of roughly 58%).

For purposes of the Lynn Plan, schools are placed in one of three categories. A "racially balanced" school is one in which the percentage of minority students (defined by Lynn to include Black/African-Americans, Hispanics, Asians and Native Americans) falls within a set range of the overall proportion of minorities in Lynn's student population. The range is plus or minus 15% for elementary schools and plus or minus 10% for other schools. To illustrate, an elementary school enrolling between 43% and 73% minority students during the 2001-2002 school year was considered racially balanced. So too was a middle school or high school that had a minority enrollment of 48% to 68%. In that school year, nine of Lynn's elementary schools and one of its middle schools were racially balanced. All three high schools qualified under that rubric.

If a school falls below the target range (i.e., if the percentage of minority students in 2001-2002 fell below 43% for an

[2]In addition, Lynn operates six alternative schools, offering such things as special needs and vocational training. Because these additional schools are not subject to the transfer provisions of the Lynn Plan, we abjure any further mention of them.

elementary school or 48% for a middle or high school), it is considered "racially isolated." Conversely, a school whose minority representation rose above the target range (i.e., over 73% for an elementary school or 68% for a middle or high school) is deemed to be "racially imbalanced." In 2001-2002, five of Lynn's elementary schools and one of its middle schools fit the racially isolated mold, whereas four elementary schools and two middle schools were racially imbalanced.

The basic mechanism of the transfer policy is simple. Subject to certain exceptions, a white student desirous of transferring may not transfer to a school with a higher percentage of white students than his or her neighborhood school. Similarly, a minority student may not transfer to a school with a higher percentage of minority students than his or her neighborhood school. Lynn prohibits such transfers because it regards them as "segregative." Conversely, transfers that Lynn regards as "desegregative" are generally allowed (indeed, encouraged). These are transfers of white students to schools with lower percentages of white students and transfers of non-white students to schools with lower percentages of non-white students. Finally, any student whose assigned neighborhood school is racially balanced can transfer to another racially balanced school without regard to whether the transfer is segregative or desegregative.

Two exceptions are worth noting. First, any student who qualifies as "multi-racial" is not subject to the described limitations on transfer. Second, transfers will be allowed unreservedly in order to unite students with siblings attending non-neighborhood schools.

Despite the exceptions, the Lynn Plan opens the door to unequal treatment based on race. Take, for example, the following not-so-hypothetical scenario. Two youngsters, one white, one African-American, are initially assigned to the same neighborhood elementary school for school year 2001-2002. The school is racially isolated (its census of minority pupils is less than 43% of the total student body). Both children ask to attend a nearby school that is racially imbalanced (its non-white population is above 73%). The white student will be permitted to transfer; the African-American student will not.

To be sure, those whose transfer requests are denied for reasons of race are entitled to appeal. Common grounds for successful appeals include medical and safety concerns, daycare issues, and other types of hardship. The record indicates that roughly half of all appeals are successful. Moreover, the transfer policy is only part of the Lynn Plan, which includes significant curricular innovations designed to foster cross-racial understanding. The Plan also envisions a construction program

designed to improve the condition of facilities, alleviate overcrowding, and make space available for desegregative transfers.

C. The Racial Imbalance Law.

The racial imbalance law (the RIL), Mass. Gen. Laws ch.15, §§ 1I, 1J, 1K, ch. 71, §§ 37C, 37D (1965), directs the Board of Education, a state agency, to remedy de facto segregation in the public schools throughout the Commonwealth. See Sch. Comm. v. Bd. of Educ., 227 N.E.2d 729, 732 (Mass. 1967). The legislature enacted the RIL in response to findings that racial imbalance had reached dramatic levels in the public schools and threatened to harm students' educational opportunities. See id. at 733-34. The RIL prescribes two main anodynes: first, it authorizes the Board to fund voluntary efforts to improve racial balance, Mass. Gen. Laws ch. 15, § 1I; second, it empowers the Board to compel school districts to adopt integration plans in certain circumstances, id. ch. 71,§ 37D, or, alternatively, to impose mandatory plans upon recalcitrant districts, id. ch. 15, § 1I.

Since the passage of the RIL, the Lynn school system has received significant state aid for its voluntary efforts to combat racial imbalance. These funds have helped pay for new construction and school renovations.[3] Moreover, Lynn is paid a state stipend of

[3]Prior to 2001, the RIL provided reimbursement for school construction and renovations undertaken for the purpose of reducing racial imbalance. The current iteration of the law no longer provides such incentives. See Mass. Gen. Laws ch. 15, § 1I; see also Comfort IV, 283 F. Supp. 2d at 344.

$500 for each and every desegregative student transfer. Finally, the Commonwealth, pursuant to the RIL, defrays certain costs associated with cross-neighborhood transportation and the establishment of magnet schools.

D. Travel of the Case.

In 1999, parents of children who had been denied transfers under the Lynn Plan (the Comfort plaintiffs) brought a civil action against the Lynn School Committee, its individual members, and several municipal hierarchs. They claimed that the Lynn Plan, and by implication the RIL, violated the Equal Protection Clause, several federal civil rights statutes (including 42 U.S.C. § 1983), and Article 111 of the Massachusetts Declaration of Rights. The Commonwealth intervened as a party defendant for the limited purpose of defending the constitutionality of the RIL. See 28 U.S.C. § 2403(b). The district court denied a motion to enjoin preliminarily the use of racial classifications in the Lynn Plan. Comfort I, 100 F. Supp. 2d at 59-60. Even though the plaintiffs suffered some setbacks in the course of serial rulings on motions to dismiss, see, e.g., Comfort III, 150 F. Supp. 2d at 289, 296-97, 302; Comfort II, 131 F. Supp. 2d at 254, 256, the case survived. Other parents (the Bollen plaintiffs) filed a second action. Their complaint stated roughly the same set of claims, but added as official capacity defendants the members of the Board of Education. The district court consolidated the two cases.

An eleven-day bench trial ensued. In a lengthy opinion, the district court dismissed a number of the Bollen plaintiffs' claims on standing grounds. Comfort IV, 285 F. Supp. 2d at 361-63. It then rebuffed the facial attack on the RIL, id. at 366-68, and determined that the transfer provisions of the Lynn Plan passed constitutional muster as a narrowly tailored response to several compelling state interests, id. at 375-92. The court proceeded to reject the plaintiffs' federal statutory claims, finding the prophylaxis of those statutes coextensive with that of the Equal Protection Clause. Id. at 392-93. Finally, the court held that the transfer provisions of the Lynn Plan did not violate Article 111 of the Massachusetts Declaration of Rights. Id. at 393-400.

This appeal followed. Unlike the district court, we have had the benefit of the Supreme Court's decisions in Grutter and Gratz. Applying the teachings of these opinions to this plethoric record and affording careful consideration to the extensive briefing submitted both by the parties and by a host of able amici, we now invalidate the transfer provisions of the Lynn Plan.

II. STANDING

"[T]he general rule is that a court should first confirm the existence of rudiments such as jurisdiction and standing before tackling the merits of a controverted case." Berner v. Delahanty, 129 F.3d 20, 23 (1st Cir. 1997). This is because "standing is a necessary concomitant to the court's power to adjudicate a case."

R.I. Ass'n of Realtors v. Whitehouse, 199 F.3d 26, 30 (1st Cir. 1999). Thus, we pause at the outset to consider the plaintiffs' standing.

In order to achieve standing, a party seeking to invoke federal jurisdiction must demonstrate three things:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). Here, the plaintiffs launch two separate challenges: they seek both an injunction against further application of the allegedly discriminatory portions of the Lynn Plan and a declaration that the RIL is unconstitutional on its face. Under prevailing precedents, the plaintiffs must demonstrate that they have standing to obtain each form of relief sought. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000).

With respect to the Lynn Plan, one plaintiff (Gina Leone) plainly meets the threshold standing requirement. Leone sues on behalf of her minor son, Troy Lamothe. The record indicates that

in March of 2000, Troy sought to transfer from his neighborhood school. The school system denied the request on the ground that the proposed transfer would be segregative. Although Troy was allowed to attend the school of his choice pendente lite, standing is manifest. See Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 n.3 (1st Cir. 1995) (accepting plaintiff's standing despite defendant's agreement not to enforce disputed ordinance pending outcome of litigation).

That ends this aspect of the matter. So long as one plaintiff has standing to press for a particular form of global relief (here, declaratory and injunctive relief against the race-conscious transfer provisions of the Lynn Plan), an inquiring court need not address the standing of other plaintiffs seeking that relief. See Watt v. Energy Action Educ. Found., 454 U.S. 151, 160 (1981); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999).

Standing with respect to prospective injunctive or declaratory relief against the RIL is a horse of a different hue. The parties stipulated, and the district court confirmed, that the portion of the RIL dealing with mandates for the reduction of racial imbalance has not been applied in Lynn. Comfort IV, 283 F. Supp. 2d at 367. Notwithstanding this lack of imbrication, the plaintiffs attempt to mount a facial attack on those mandatory provisions. The plaintiffs say that those mandates, codified at

Mass. Gen. Laws ch. 71, § 37D, give white children a right to transfer out of isolated schools and minority children a right to transfer out of imbalanced schools — rights that are denied to minority children in isolated schools and to white children in imbalanced schools. Appellants' Br. at 56. Even if that is so in theory, only a person who was denied a transfer on the basis of those provisions has standing to challenge them. The plaintiffs cannot overcome this obstacle. We explain briefly.

The mandatory provisions of section 37D apply only to recalcitrant school districts, that is, to communities that eschew voluntary action to combat identified racial imbalance. Sch. Comm. of Springfield v. Bd. of Educ., 319 N.E.2d 427, 429 (Mass. 1974). Lynn took a proactive stance: it drafted and implemented a voluntary plan — and it is the terms of that plan, not the strictures of the RIL, which curtail the plaintiffs' transfer rights. Thus, the plaintiffs have sustained no cognizable injury from the mandatory provisions of the RIL.[4] Accordingly, the plaintiffs lack standing to seek a declaration anent their validity.

The plaintiffs also lack standing to seek prospective injunctive or declaratory relief against those portions of the RIL

[4]We add that the plaintiffs have not shown that they are under any imminent threat of being subjected to these mandates. That possibility will depend, in large part, upon Lynn's response to this decision.

that encourage — but do not command — the creation of voluntary plans to combat racial imbalance. Redressability is a prerequisite for standing, see N.H. Right to Life PAC v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996), and it requires a substantial likelihood that the sought-after relief will in fact palliate the alleged injury. Bonas v. Town of N. Smithfield, 265 F.3d 69, 73 n.4 (1st Cir. 2001); Am. Postal Workers Union v. Frank, 968 F.2d 1373, 1376-77 (1st Cir. 1992). In this instance, the plaintiffs describe their alleged injury as both a racially-based denial of transfers and a stigmatic harm stemming from their inability to "compete" on equal terms for transfers. Even assuming for argument's sake that this asserted injury is traceable in some way to the RIL, the plaintiffs cannot show that their first form of requested relief — enjoining the Board of Education from insisting upon "racial balancing plans" as a condition of any financial assistance to local schools — will either pave the way for racially unrestricted transfers within the Lynn public schools or eliminate the perceived stigmatic harm.

To illustrate the point, one need only look at the record. Under the grandfathered terms of the pre-2001 RIL, see supra note 3 and accompanying text, Lynn does receive state funding for construction and busing based on its voluntary efforts to combat racial imbalance. Even so, were we to grant the requested relief and direct the Board to allocate financial assistance without regard to racial balancing efforts, redress would not

necessarily follow. There is simply no reason to believe that Lynn would cancel its transfer program merely because it could receive state subsidies without it.

In an effort to parry this thrust, the plaintiffs and their amicus present a second theory for prospective relief. They posit that the RIL is the de facto cause of their injury in that it effectively coerces school districts into adopting discriminatory racial balancing schemes (and for that reason is unconstitutional). If this were true, declaratory relief would clearly redress their harm. See N.H. Right to Life PAC, 99 F.3d at 13.

The difficulty is that the "voluntary plan" provisions of the RIL comprise a declaration of a policy goal to fight de facto segregation, see Mass. Gen. Laws ch. 71, § 37C, coupled with a pledge of financial aid to help schools achieve it, id. ch. 15, § 1I. Those provisions do not dictate a procedure or methodology that communities must use in order to achieve this goal. The plaintiffs would need to show that the aspirational provisions of the RIL are causally responsible for a school district's institution of an unconstitutional racial classification. The plaintiffs have made no such showing in the case at hand.

What is more, even if such a causal link could be forged, none of the plaintiffs seeking to overturn the RIL could credibly claim that the RIL threatened to cause him or her the predictable future harm necessary for prospective relief. The voluntary

provisions of the RIL — the only provisions that arguably apply to Lynn at this point in time — contain no requirement that school systems employ racially restrictive transfer methods (or any other particular methods, for that matter). Comfort IV, 283 F. Supp. 2d at 342 n.25. Unlike the affirmative action context, in which set-asides for minority applicants place all non-minorities at a competitive disadvantage, the goal of non-competitive racial balancing does not predictably cause one racial group as opposed to another to be burdened. The plaintiffs can only speculate, then, that any possible future plan that may be conceived under the auspices of the RIL's voluntary provisions will harm them based on their race. Such rank speculation does not rise to the level of an Article III case or controversy, and the fact that past damage occurred due to the prior misuse of a discredited policy does not abate the speculation. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).

In other words, unless and until Lynn adopts a specific methodology for achieving the goals suggested by the RIL, the plaintiffs will not be able to show that they are under an imminent threat of injury "that affects [them] in a personal and individual way." Lujan, 540 at 561 n.1. Accordingly, the plaintiffs do not have standing to challenge the aspirational provisions of the RIL.[5]

[5]We add that, even if the plaintiffs had shown standing, we largely agree with the district court that a facial challenge to the RIL must fail. Comfort IV, 283 F. Supp. 2d at 367-68. After

III. EQUAL PROTECTION

The main issue on appeal concerns the constitutionality of the use of race to restrict a student's ability to transfer to a non-neighborhood public school. The plaintiffs contend that by mechanically taking race into account, the Lynn Plan runs afoul of the Equal Protection Clause and various federal statutes (including 42 U.S.C. § 1983). The resolution of the section 1983 claim depends on the fate of the constitutional challenge — and the successful pursuit of that challenge, see text infra, moots the remaining federal statutory claims. Consequently, we shape our analysis in terms of the equal protection issue.

A. Standard of Review.

This appeal comes to us at the conclusion of a bench trial. Consequently, we accord deferential review to the court's findings of fact and plenary review to its legal conclusions. Wessmann v. Gittens, 160 F.3d 790, 795 (1st Cir. 1998). The latter standard applies where, as here, we deal with questions of whether the facts, as found, justify the court's legal conclusions. Id.

B. Level of Scrutiny.

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all, "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). It cannot be disputed that such circumstances exist here. See Boston's Children First v. Boston Sch. Comm., 260 F. Supp. 2d 318, 327 (D. Mass. 2003) (finding that the goals espoused by the RIL may be satisfied by race-neutral methods), aff'd sub nom. Anderson v. City of Boston, 375 F.3d 71 (1st Cir. 2004).

The Equal Protection Clause commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. By its terms, the Equal Protection Clause applies to persons, not groups. See Shelley v. Kraemer, 334 U.S. 1, 22 (1948). It follows that whenever a state or local government takes an action based on race — a particularly irrelevant and generally prohibited type of group classification — it is the courts' role to ensure that an individual's personal right to equal protection has not been infringed by that classification. Grutter, 539 U.S. at 326; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

The law is adamantine that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. Gratz, 539 U.S. at 270. This principle has particular bite because "[t]he Supreme Court consistently employs sweeping language to identify the species of racial classifications that require strict scrutiny." Wessmann, 160 F.3d at 794. Under the Lynn Plan, a student's race may be determinative of whether he or she can transfer to a given non-neighborhood school. Strict scrutiny is a natural fit for such a race-conscious regime. See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 377 F.3d 949, 960-61 (9th Cir. 2004) (applying strict scrutiny to factually similar school assignment plan).

Remarkably, the defendants and some of their amici strive to persuade us that we should apply a more relaxed level of scrutiny here. They cite cases such as Anderson v. City of Boston, 375 F.3d 71, 87-88 (1st Cir. 2004), and Raso v. Lago, 135 F.3d 11, 16-17 (1st Cir. 1998), for the proposition that race-neutral diversity plans are not necessarily subject to strict scrutiny. Building on this foundation, they then posit that the Lynn Plan does not employ classifications preferring the interests of one race over those of another because (i) it affects whites and non-whites equally, and (ii) given the parties' stipulation that all of Lynn's schools provide equivalent educational opportunities, the transfer policy imposes no unequal burden or benefit on anyone. We find these protests unavailing: the Lynn Plan is not race-neutral, and no amount of artful advocacy can change that fact.

As for the defendants' first point, burdening different groups equally does nothing to pull the constitutional sting from classifications based on race. See Loving v. Virginia, 388 U.S. 1, 8 (1967); Wessmann, 160 F.3d at 795 n.1. Similarly, the fact that the racial identity of the burdened party will change with the circumstances of a particular transfer does not alter the reality that, in each instance, "someone from some group will be benefitted and a different someone from a different group will be burdened" through the explicit use of race. Wessmann, 160 F.3d at 794. This

reality demands the application of strict scrutiny. See Gratz, 539 U.S. at 270.

As for the defendants' second point, we refuse to entertain the fiction that because all of Lynn's schools provide equivalent academic training, no person is benefitted or burdened by the preferential handling of transfer requests. The Court made it pellucid a half-century ago that, in terms of public education, separate is never equal. See Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954). This is common sense: there are factors other than academic quality that often influence a student's preference to attend a particular school. This reality is amply demonstrated by the fact that parents (the plaintiffs in these cases are exemplars) find one school so far preferable to another that they elect to forfeit the convenience of neighborhood schooling in search of a better, albeit more distant, education.

We conclude, therefore, that the Lynn Plan must be subjected to strict scrutiny. Under that standard, "[racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." Grutter, 539 U.S. at 326. To facilitate this inquiry, the law assigns the proponents of race-based classifications the burden of demonstrating that the strict scrutiny standard is satisfied. Gratz, 539 U.S. at 270.

While it is exacting, strict scrutiny is not a mandatory death sentence for a race-conscious policy. Grutter, 539 U.S. at 326; Adarand, 515 U.S. at 237. "When race-based action is necessary to further a compelling government interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." Grutter, 539 U.S. at 327.

We add, moreover, that strict scrutiny is not blind to context. That type of inquiry "is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." Id. (emphasis supplied). Bearing this in mind, courts must judge racial classifications in light of the situations in which they arise. Wessmann, 160 F.3d at 796. Consequently, to determine whether a particular racial classification offends the equal protection guarantee, a reviewing court must factor any and all relevant contextual considerations into the decisional calculus. Adarand, 515 U.S. at 228.

C. Compelling State Interest.

Against this backdrop, we turn to the existence vel non of a compelling state interest. We begin this phase of our analysis with a close look at the Grutter Court's pronouncements about what constitutes a compelling interest in the educational context.

To understand Grutter, we must retreat to Justice Powell's opinion in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). That opinion, decisive in the case, indicated that, wholly apart from any remedial considerations, a university's interest in a diverse student body might, in some circumstances, rise to the level of a compelling state interest. Id. at 311-12, 320 (opinion of Powell, J.). The Supreme Court's statements over the next fifteen years did little to reinforce the view that diversity could be a sufficiently compelling interest outside the remedial context. See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality op.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality op.). Grutter supplied the missing reinforcement, holding that a law school's interest in obtaining the educational benefits that flow from having a diverse student body was compelling enough to justify the narrowly tailored use of race in admissions. Grutter, 539 U.S. at 343.

Identifying precisely the compelling interest sanctioned in Grutter is easier said than done. Grutter involved law school admissions. The defendant took into account an applicant's racial and ethnic background as one of several "soft variables" used in assessing that applicant's prospects for admission. Id. at 315. The school justified this strategy as furthering its stated goal of assembling a class that was both "exceptionally . . . qualified and broadly diverse." Id. at 329. A subsidiary goal was to enroll a

"critical mass" of minority students and, thus, enhance the law school's quest for broad diversity. Id.

The Grutter Court took pains to clarify that the law school's plan did not pursue a critical mass of minority students for its own sake, but, rather, for the sake of the educational benefits that flow from having a diverse student body. Id. at 329-30 (acknowledging that racial balancing, for its own sake, is patently unconstitutional). These educational benefits included promoting cross-racial understanding, breaking down stereotypes, creating livelier and better informed class discussions, and preparing students to succeed in an increasingly diverse society. Id. at 330.

The Grutter Court largely deferred to the law school's educational judgment not only in determining that diversity would yield these educational benefits, but also in determining that these benefits were critical to the school's educational mission. Id. at 328-33. The Court seemed to take comfort in the fact that the law school's conclusions were bolstered by expert evidence. Id. at 330. Justice O'Connor warned, however, that the Court's "scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university." Id. at 328.

The Grutter Court concluded that the quest for these benefits comprised a compelling state interest. Id. In so ruling, the Court acknowledged "the overriding importance of preparing students for work and citizenship . . . as pivotal to sustaining our political and cultural heritage." Id. at 331 (citation and internal quotation marks omitted). In a comment that seems particularly pertinent to the university context, the Court emphasized "that the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity" so that our nation's leaders will have "legitimacy in the eyes of the citizenry." Id. at 332.

With this foundation in place, we mull the stated interest that Lynn seeks to achieve through use of racial classifications. This is not a case where the racial classification is aimed at remedying past segregation. Comfort IV, 283 F. Supp. 2d at 390 n.101. Rather, the parties stipulated that Lynn's interests

> include fostering integrated public schools and what Lynn believes are its positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal education and life opportunities and increasing the quality of education for all students.

At first blush, Lynn's avowed interests appear to fall into two distinct categories: (i) reaping the educational benefits that flow from having a racially diverse student body in each of its public schools, and (ii) avoiding the negative educational consequences that attend racial isolation. Closer inspection shows these interests to be two sides of the same coin.

In advocating the importance of racial diversity in its schools, Lynn maintains that ensuring a racially diverse student body has produced, and will continue to yield, benefits central to its educational mission. These benefits include many of the same benefits cited by the Grutter Court: disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial world. To some extent, Lynn has history on its side. Since the inception of the Lynn Plan, the school system has experienced many positive changes, such as higher attendance rates, declining suspension rates, a safer environment, and apparent academic gains.

All of these benefits can be explained, in the defendants' view, by two related theories. The first is an intergroup contact theory, which posits that "under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes and the disarming of stereotypes." Comfort IV, 283 F. Supp. 2d at 356. The second is a critical mass theory, which posits that "unless

there is a 'critical mass' of white and nonwhite students in a given school," it will be difficult to obtain the benefits envisioned by intergroup contact. Id. at 357. Citing these theoretical underpinnings, the district court gave credence to the defendants' assertion of a causal link between improvements in the school system and increased racial balance. Id. at 354.

Lynn's second claimed compelling interest — avoiding the damaging educational effects of racial isolation in its schools — is largely an inverse restatement of the first. See Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130 (4th Cir. 1999); Brewer v. W. Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999). According to the defendants, the Lynn Plan aspires to reduce or eliminate the number of schools which, as a result of residential segregation, enroll a significantly outnumbered racial minority population. The defendants' expert evidence suggests that racially isolated students often feel psychological burdens that can lead to poor attendance and parlous academic performance.

When all is said and done, these two interests collapse into one. Whether stated as achieving the benefits of intergroup contact and critical mass or avoiding the pitfalls of racial isolation, the central idea is that students — all students — are better off in racially diverse schools. We therefore restate the

interest at stake here as obtaining the educational benefits of a racially diverse student body.

A short time ago, we expressly reserved the question whether the need for racial diversity alone might, under certain circumstances, constitute a compelling governmental interest sufficient to warrant some type of race-conscious action.[6] See Wessmann, 160 F.2d at 798. The Lynn Plan poses that reserved question.

At trial, the defendants presented considerable evidence of both educational and environmental gains (e.g., improved achievement test scores, decreased racial tension). The plaintiffs do not gainsay that progress, but, rather, question whether these advancements fairly can be attributed to the race-conscious elements of the Lynn Plan. The plaintiffs variously contend that the Supreme Court has foreclosed the possibility that obtaining educational benefits from racial diversity can ever constitute a compelling state interest; that increased academic achievement and racial harmony can be explained by other, race-neutral aspects of the Lynn Plan (e.g., new facilities, greater economic resources, curriculum changes, and teacher training); that the defendants offered no relevant statistical analyses; and that, in all events,

[6]Grutter did not explicitly resolve the question, referring instead to the compelling interest in obtaining the benefits that accrue from a diverse student body. 539 U.S. at 328. Racial diversity is a subset of that broader diversity.

any connection between racial balance and educational benefit is belied by the fact that, as the parties have stipulated, the quality of education is comparable throughout Lynn's schools (even those deemed racially isolated or imbalanced). Upon careful examination, we find these contentions unpersuasive.

To begin, we acknowledge that the Lynn Plan's transfer mechanism expressly aims at attaining a racial balance in the city's schools, and the Court frequently has warned that racial balancing, for its own sake, can never survive strict scrutiny. See, e.g., Grutter, 539 U.S. at 330; Freeman v. Pitts, 503 U.S. 467, 494 (1992). Still, we reject the idea that obtaining educational benefits from racial diversity can never constitute a compelling state interest. Where a community does not seek racial balance for its own sake but for the sake of the educational benefits that diversity plausibly may provide, there is no absolute bar. See Grutter, 539 U.S. at 330. The district court found that this was Lynn's purpose, Comfort IV, 283 F. Supp. 2d at 375-76, and the record supports that finding. We see no reason to second-guess it. Cf. Grutter, 539 U.S. at 328 (stating that, typically, an "educational judgment that . . . diversity is essential to its educational mission is one to which we defer").

It is a closer question whether the defendants have proven that racial diversity is compelling in the K-12 context. On one hand, the educational improvements that Lynn has experienced

are consistent with the social science testimony offered in support of the Plan. The parties' stipulation that "the education provided . . . in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum" does not negate the possibility that racial diversity has produced some of these gains. On the other hand, the question lingers as to whether the dearth of evidence explicitly linking educational advancements to improved racial balance is fatal. See Wessmann, 160 F.3d at 805 (discussing a party's failure to eliminate non-racial variables in evaluating the necessity of a race-conscious policy). The tie-breaker, as we see it, is that the interests asserted bear a strong familial resemblance to those that the Grutter Court found compelling. There is no reason to believe that these interests are substantially more potent in the context of higher education than in the context of elementary and secondary education.[7] See Parents Involved, 377 F.3d at 964; cf. Plyler v. Doe, 457 U.S. 202, 221 (1982) (emphasizing the importance of K-12 education "in maintaining the fabric of our society").

[7]In point of fact, there was significant evidence presented at trial supporting the view that the benefits to be derived from a racially diverse educational milieu are more compelling at younger ages. See, e.g., Comfort IV, 283 F. Supp. 2d at 356 (summarizing expert's testimony to the effect that "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking").

In the last analysis, we agree with Judge O'Scannlain that, "[a]t bottom, Grutter plainly accepts that constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions." Parents Involved, 377 F.3d at 964. Though the benefits attributed to the Lynn Plan do not mimic exactly the benefits described in Grutter, one important lesson of Grutter is that the compelling state interest in diversity should be judged in relation to the educational benefits that it seeks to produce. 539 U.S. at 330. The Lynn Plan's use of race aspires to create many of the same benefits that were cited approvingly by the Grutter Court, including breaking down racial barriers, promoting cross-racial understanding, and the umbrella notion of preparing students for a world in which "race unfortunately still matters." Id. at 333. While Lynn adds benefits not contemplated in Grutter (e.g., student safety and attendance) and downplays the advantages of viewpoint diversity in the classroom — a benefit heralded in Grutter, id. at 330 — these differences seem to be the logical result of context. It is natural to presume that safety and attendance issues will loom larger in elementary and secondary schools as opposed to graduate schools and, conversely, that lively classroom discussion is a more prominent form of learning in law schools (which generally prefer the Socratic method) than in a K-12 setting.

The short of it is that the defendants have made a persuasive case that a public school system has a compelling interest in obtaining the educational benefits that flow from a racially diverse student body. Accord Parents Involved, 377 F.3d at 964; Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 753 (2d Cir. 2000). We so hold.

D. Narrow Tailoring.

Even when the use of racial distinctions is permissible to advance a compelling governmental interest, the government's use of such distinctions must be sculpted to fit the permitted purpose. Grutter, 539 U.S. at 333. Insisting on a close fit between means and end not only ensures that the use of race is no broader than necessary to achieve the government's legitimate interests, but also enables courts to flush out those racial classifications that are constitutionally impermissible. Gratz, 539 U.S. at 270.

This component of the equal protection analysis is known as the narrow-tailoring requirement. Stated generally, narrow tailoring demands that the proponent show that the chosen plan or practice is (i) necessary to the declared purpose, (ii) proportional to that purpose, (iii) limited in time, and (iv) not productive of a greater than necessary burden on third parties. See United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality op.). This is, however, the view from 50,000 feet — and at that level of generality the formulation is of limited value. With that

in mind, the Supreme Court repeatedly has reminded us that the narrow-tailoring inquiry is case-specific; it "must be calibrated to fit the distinct issues raised by the use of race" in a given context. Grutter, 539 U.S. at 333-34. Thus, the factors used to judge whether a particular plan or practice is narrowly tailored will depend, in the first instance, on the nature of the compelling interest that the government seeks to further.

The Court has not yet considered a constitutional attack on a race-based transfer policy for elementary and secondary schools. Nevertheless, the recent opinions in Grutter and Gratz "define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs," Grutter, 539 U.S. at 333, and thus furnish some relevant guideposts for how the narrow-tailoring inquiry should function where the State's professed interest is achievement of diversity in the K-12 setting.

Gratz involved the University of Michigan's undergraduate admissions program. The University automatically assigned 20 points — one-fifth of the 100 points needed to guarantee admission — to an applicant from an underrepresented racial or ethnic minority group. Gratz, 539 U.S. at 255. This 20-point bonus effectively made race/ethnicity determinative for minimally qualified minority applicants. Id. at 272.

Grutter involved law school admissions. The law school took race into account as one of several variables in an

individual's application. Grutter, 539 U.S. at 340. The school assigned no mechanical score based on an applicant's race; instead, it considered race only as one of several possible ways in which an applicant could enrich the diversity of the student body. Id. at 315-16. Moreover, the law school set no quotas for racial or ethnic minorities. Id. at 335-38.

The Supreme Court struck down the plan used in Gratz while upholding the one used in Grutter. In arriving at these decisions, the Court delineated how to calibrate the narrow-tailoring inquiry. First, a race-conscious admissions program must use race in "a flexible, non-mechanical way" if its plan is to be considered narrowly tailored. The plan cannot institutionalize a quota system or in any way insulate one category of applicants from competition with another solely on account of race. Id.; Gratz, 539 U.S. at 258, 270-72. Race can, however, be used as a plus factor in the course of an individualized consideration of each applicant. Grutter, 539 U.S. at 334. Second, the Court chanted a familiar mantra: that government must consider, as a preferred option, workable, race-neutral alternatives that hold out the promise of achieving the compelling interest that prompts a particular plan or practice. Id. at 339. Third, narrow tailoring "requires that a race-conscious admissions program not unduly harm members of any racial group." Id. at 341. Fourth, the use of racial distinctions must be limited in time. Id. at 342. In the

university context, "the durational requirement can be met by sunset provisions . . . and periodic reviews to determine whether racial preferences are still necessary." Id.

If we were to import into this case the Court's first narrow-tailoring requirement, the Lynn Plan could not survive strict scrutiny. See Parents Involved, 377 F.3d at 969. The Lynn Plan explicitly hinges the availability of a transfer on a student's race. There is no individualized consideration of a student's qualifications, no head-to-head comparison of one student to another, and no weight given to a student's other potential contributions to diversity. Apart from an appeals process that allows exceptions only for hardship or other special circumstances, race generally determines the fate of a student's application to transfer to a non-neighborhood school. So viewed, the Lynn Plan is even more mechanical and even less flexible than the collegiate admissions policy that the Gratz Court found wanting.[8]

Still and all, we hesitate to stop at that point because transplanting the first narrow-tailoring requirement root and branch from Grutter and Gratz would ignore the Court's admonition that context matters. It is conceivable that a nuanced comparison

[8]It is no response to suggest, as have several amici, that the volume of applicants for transfer in Lynn, combined with the school system's limited resources, vitiates the need for individualized review. "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." Gratz, 539 U.S. at 275.

between the context of competitive collegiate or graduate school admissions and non-competitive primary or secondary school transfers may show that a mechanical consideration of race in the latter context should not be treated as the shibboleth that it is in the former. We essay that comparison.

In the admissions context, the Supreme Court has catalogued several dangers flowing from the mechanical, inflexible, and exclusive use of race as a determinant. For one thing, such an approach insulates the preferred category of applicants from competition with other applicants. Grutter, 539 U.S. at 334. For another thing, such an approach feeds the stereotype that students from the preferred group lack merit, thus raising the specter of stigmatic harm. See Bakke, 438 U.S. at 298 (opinion of Powell, J.) (stating that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection"). These dangers are far less ominous, if not altogether absent, in the K-12 setting. In particular, the transfer provisions of the Lynn Plan do not operate competitively: "X" is granted or denied a transfer on the basis of a set (albeit race-conscious) standard, not on the basis of how he stacks up when compared to "Y." Thus, the provisions neither skew a competitive process nor substitute race as a proxy for an applicant's merit. It is also arguable that the denial of a transfer does not inhibit the would-be transferee's access to a

limited public good. After all, the parties have stipulated that Lynn's schools are academically equivalent, and the Lynn Plan denies no child a scholastically comparable education.[9]

Competitive disadvantage and stigmatic harm are not, however, the only reasons behind the Supreme Court's disdain for quotas and other inflexible uses of race. The Court has recognized that such policies foster the unwarranted presumption that all members of a given racial group represent the same viewpoint. See Gratz, 539 U.S. at 271. Regardless of the burden imposed by a racial preference, the simple act of granting benefits based on a quota or mechanical use of race will breed cross-racial tension. See Croson, 488 U.S. at 493. Furthermore, when government indulges in the automatic and unflinching use of race in the bestowal of any benefit, that usage counteracts the ultimate goal of relegating racial distinctions to irrelevance. Id. at 495. The unbending use of race in the Lynn Plan heightens these dangers. See Parents Involved, 377 F.3d at 969-70.

Although the question is close, we conclude that the distinction between competitive admissions and non-competitive transfer programs is insufficient to justify us in disregarding the Supreme Court's recent guidance. While the Court has emphasized

[9]This is not to say that an applicant who is denied a transfer suffers no harm. Rather, we are merely raising the possibility that the harm is different in scope and kind from that experienced in the competitive admissions setting.

the importance of context in framing the narrow-tailoring inquiry, nothing in either Grutter or Gratz indicates a willingness to embrace mechanical, race-based programs in other corners of the educational world. If there is to be a retreat from the Supreme Court's blueprint, the Court itself must light the way.

The outcome here flows naturally from this determination. Although the Lynn Plan is not a pure quota system, it uses race mechanically both to deprive some individuals of a desired benefit and to grant the same benefit to others. Because the Lynn Plan makes race decisive and forgoes individualized consideration of transfer applications, it cannot be deemed narrowly tailored to the community's compelling interest in obtaining the educational benefits of diversity. Accord Parents Involved, 377 F.3d at 969-70; Eisenberg, 197 F.3d at 133; Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999).

Although we could end our analysis of the Lynn Plan at this point, we think it wise to point out that the Plan has other narrow-tailoring shortcomings. We briefly discuss these flaws.

Even a flexible use of race will fail narrow tailoring under the Grutter/Gratz test if it "unduly burden[s] individuals who are not members of the favored racial and ethnic groups." Grutter, 539 U.S. at 341 (citation and internal quotation marks omitted). Thus, racial classifications cannot be used more often than necessary to satisfy the compelling governmental interest that

is at stake. See id. The Lynn Plan cannot pass muster in this respect.

At trial, the defendants' expert testimony was to the effect that intergroup contact between students of different races produces significant educational benefits, and that those benefits only accrue when a critical mass of minority and non-minority students exists in each school. Although these witnesses did not pinpoint any "magic number" sufficient to form a critical mass, they agreed that 20% is the figure most often cited in the relevant literature.

The plaintiffs argue persuasively that the Lynn Plan is not narrowly tailored to achieve the educational benefits of intergroup contact. The touchstone for gaining the benefits of intergroup contact is the assembly of a critical mass of minority and non-minority students in each school. But the Lynn Plan is calibrated toward proportional representation rather than critical mass; it seeks to maintain within each school a racial mix within 10%-15% of the racial mix of the aggregate student population (depending on the level of school). Thus, because Lynn's overall non-white school-aged population is 58%, an elementary school with a 40% non-white enrollment qualifies as racially isolated even though that school contains a critical mass of both white and non-white students.

The district court's response to this apparent failing is that while critical mass is required for educational benefit, that benefit increases the closer a given school comes to racial balance (that is, to mirroring the racial makeup of the community). See Comfort IV, 283 F. Supp. 2d at 357 (stating that "gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is [sic] reduced and racial harmony and understanding increase[]"). This rationale exceeds the bounds of the School Committee's presented theory and, in the end, collapses of its own weight.

The compelling government interest that animates the Lynn Plan is the interest in attaining the educational benefits of a level of racial diversity commensurate with critical mass. The use of race-conscious elements must, therefore, be narrowly tailored toward accomplishing that goal — not some other, more grandiose goal. A narrowly tailored plan would attempt to assemble a sufficient number of minority and non-minority students in each school to enable intergroup contact (a number that the defendants and their experts have equated with critical mass). In the same vein, a narrowly tailored plan would deny transfers on racial grounds only when such transfers would tend to jeopardize that number (that is, to jeopardize critical mass).[10] The Lynn Plan does

[10]This is not to say that such a plan must be tailored to the attainment of a critical mass of exactly 20%. Neither equal protection nor critical mass are matters of scientific precision,

neither of these things. Consider, for example, that for the 2001-02 school year, two of Lynn's elementary schools — Aborn (35%) and Hood (42%) — had minority populations substantially above the 20% necessary to achieve critical mass but below the 43% necessary to qualify as racially balanced. A minority student seeking to transfer from either of these institutions to a racially balanced school normally would be turned down, even though that transfer would not deprive either the transferor or transferee school of critical mass. A white student, on the other hand, would be allowed to make the move. By contrast, Lynn allows all transfers that do not imperil racial balance, even if particular transfers are segregative. For instance, minority students may freely transfer from Lincoln-Thomson (43% minority) to Ford (71% minority), because neither the transferor nor transferee school will be deprived of racial balance (as that term is defined by Lynn).

Using racial restrictions to achieve benefits otherwise absent is one thing; using those restrictions to edge closer to racial balance is quite another. Except where necessary to correct the effects of past constitutional violations — a situation not extant here — racial balancing is "antithetical to our

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and an otherwise proper plan could overshoot the number necessary for critical mass as long as the plan was crafted with a view toward attaining critical mass. Here, however, the plan is designed to achieve racial balance, not critical mass.

constitutional jurisprudence." Wessmann, 160 F.3d at 799. On this record, the numbers tell the tale: the Lynn Plan is not narrowly tailored to achieve the municipal defendants' asserted diversity interests.

Under the Grutter/Gratz test, narrow tailoring also requires that those who would use race as a criterion first demonstrate that they have exhausted race-neutral alternatives. Grutter, 539 U.S. at 339-40; Wygant, 476 U.S. at 280 n.6. This does not require the proponents to try every conceivable alternative prior to the implementation of a race-conscious plan; they may reject alternatives that are shown, on the record, to be unworkable or unpromising. Grutter, 539 U.S. at 339; Croson, 488 U.S. at 507-08; Paradise, 480 U.S. at 171. We find that the responsible parties here — the municipal defendants — have not carried this burden.

We give credit where credit is due: the municipal defendants did seriously consider, and plausibly reject, a number of race-neutral alternatives. These included (i) a no-transfer policy, see Comfort IV, 283 F. Supp. 2d at 387-88 (crediting evidence from a demographics expert that instituting such a policy would throw several elementary schools into racial imbalance); (ii) a policy of unrestricted transfers, see id. at 388 (crediting evidence that instituting such a policy would result in 500 to 800 segregative transfers per year); (iii) a redrawing of district

lines, see id. at 387-88 (noting the impracticalities of such a reconfiguration); (iv) a regimen of forced busing, see id. at 347 (concluding that the problems attendant to forced busing, with all its historical baggage, justified Lynn's rejection of a "controlled choice" scheme); (v) a lottery system, see id. at 389 (finding that demographic and scheduling factors warranted dismissal of this concept); and (vi) a plan using socioeconomic status, rather than race, as a benchmark for allowing transfers, see id. at 389 n.100 (noting that transfers based exclusively on socioeconomic status would exacerbate existing racial imbalance).[11]

Notwithstanding these laudable efforts, it is equally clear that the process of consideration and rejection of these options was geared toward a goal of racial balance, and not toward a goal of ensuring a critical mass of minority and non-minority students in each school. If Lynn decides to create another plan to alleviate the perceived problem of de facto segregation, it would do well to revisit these measures (or, at least, such of them as held promise) in terms of critical mass theory. Lynn should also take note of the successes of other Massachusetts communities in creating race-neutral plans and study whether those plans might work in Lynn. See, e.g., Anderson, 375 F.3d at 74 (1st Cir. 2004)

[11]We note that the use of socioeconomic status instead of race would not trigger strict scrutiny. The sting of rejection based on having too much money "pales in comparison to the insult of rejecting an applicant solely because of the color of [one's] skin." Parents Involved, 377 F.3d at 972 n.26.

(approving Boston's race-neutral plan for achieving diversity in the city's schools).

The Lynn Plan arguably has another flaw. In order to survive constitutional scrutiny on narrow-tailoring grounds, the use of race-based distinctions must be limited in time. Grutter, 539 U.S. at 342. This durational requirement stems from the reality that a core purpose of the Fourteenth Amendment — to eradicate governmental discrimination based on race — sometimes necessitates the use of race as a temporary means to its accomplishment. See Croson, 488 U.S. at 497-98. Consequently, even when race-conscious plans are justified, educators should stand ready to replace them with race-neutral alternatives as new programs became available or as changing circumstances permit. Grutter, 539 U.S. at 342.

To this end, the Supreme Court, albeit in the context of higher education, has recommended that administrators consider sunset provisions in race-conscious policies and assiduously review such policies "to determine whether racial preferences are still necessary to achieve student body diversity." Id. We see no meaningful distinction between higher education and primary or secondary education when it comes to these criteria. Lynn falls short on this ground.

To be sure, the district court believed that the Lynn Plan had a "built-in" time-limiting mechanism because racially

restrictive transfers to a particular school cease once that school is in line with the community's white-nonwhite ratios. Comfort IV, 283 F. Supp. 2d at 377. We find this feature inadequate. Grutter posits that schools must periodically review the continued necessity of race-conscious measures and implement changes as and when race-neutral means become available. Id. at 342. So long as that review is maintained, a race-conscious plan may be somewhat open-ended. Id. at 343.

Here, however, the internal mechanism of the Lynn Plan is insufficient to take account of external changes in circumstances. The School Committee performs ongoing demographic monitoring, gathering data on the schools' racial composition, on transfers, and on the performance of the magnet schools. What the record does not indicate, though, is that the Committee has committed to undertake any manner of periodic review to determine whether ongoing developments might render the use of racial restrictions superfluous. Without that review, the mere compilation of statistics is not enough to satisfy the durational requirement. See Eisenberg, 197 F.3d at 132. Any narrowly tailored plan must include a commitment adequate to ensure that school officials afford periodic, serious, and good-faith consideration of the continued need for racial restrictions.

To summarize succinctly, the seas of strict scrutiny can be rough sailing. So it is here: for four reasons — the

mechanical use of race, a design sculpted more to the achievement of racial balancing rather than to the educational benefits flowing from the attainment of critical mass, the failure fully to explore the feasibility of race-neutral alternatives, and the absence of a commitment to periodic review — we conclude that the Lynn Plan is not narrowly tailored to achieve the compelling governmental interest that spawned it in the first place.

That gets the grease from the goose. We hold that the transfer provisions of the Lynn Plan fail to survive the plaintiffs' equal protection challenge. We take no joy in this conclusion — the School Committee's motivations here were noble. Nevertheless, while we may empathize with the School Committee, this case aptly illustrates what government at every level should know: charting a course that depends upon racial classifications is, in constitutional terms, a risky business.

This holding means, of course, that the plaintiffs must prevail on their section 1983 claim. We regard their other federal statutory claims as moot. So too is their claim that the Lynn Plan violates Article 111 of the Massachusetts Declaration of Rights. Consequently, we do not address any of the latter claims.

IV. RECUSAL

Despite our resolution of the central issue on appeal, we still must address the plaintiffs' claim that the district judge should have disqualified herself from hearing this case. The

argument for recusal involves the following syllogism: (i) prior to her appointment to the federal bench, Judge Gertner was a member of the Lawyers' Committee for Civil Rights (LCCR), a nonprofit organization; (ii) LCCR is an advocacy group that unsuccessfully moved to intervene in this litigation on the side of the defendants; and therefore (iii) the law required that Judge Gertner recuse herself. Judge Gertner denied the recusal motion in an unpublished order dated March 21, 2002. We review that ruling for abuse of discretion. Camacho v. Autoridad de Telefonos, 868 F.2d 482, 490 (1st Cir. 1989).

The controlling statute is 28 U.S.C. § 455, which limns the applicable standards for recusal. That statute provides in pertinent part that a judge "shall" recuse herself "in any proceeding in which [her] impartiality might reasonably be questioned." Id. § 455(a). A party who suggests that recusal is appropriate must support the motion with facts that "provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality." In re: Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001) (quoting In re United States, 666 F.2d 690, 694 (1st Cir. 1981)). The plaintiffs have failed to cross this threshold.

Judges do not spring from Zeus's brow, bereft of any worldly contacts. To the contrary, every judge dons his or her robe with a lifetime of background experiences, a roster of

acquaintances and associations, and a myriad of views. This past history, in and of itself, seldom is sufficient to require recusal. Brody v. President & Fellows of Harvard Coll., 664 F.2d 10, 11 (1st Cir. 1981) (per curiam). Unless there is a direct link sufficient to furnish a reasonable basis for doubting impartiality, the judge ought to continue to sit. In re United States, 158 F.3d 26, 31 (1st Cir. 1998); Blizard v. Frechette, 601 F.2d 1217, 1221 (1st Cir. 1979); cf. United States v. Giorgi, 840 F.2d 1022, 1035 (1st Cir. 1988) (explaining that unless a party can establish a reasonable factual basis to doubt a judge's impartiality "by some kind of probative evidence," then the "judge must hear a case as assigned") (emphasis in original) (internal quotation marks omitted).

These principles are dispositive here. LCCR is not a party to this case. Even if it were, Judge Gertner's relationship with that organization terminated upon her ascension to the bench on February 14, 1994. There is no allegation that she has maintained continuing ties with LCCR. Given the eight-year interval between the severing of the judge's connection with LCCR and the recusal motion, no reasonable attack on her impartiality can be mounted on that basis. Thus, recusal was not obligatory. See, e.g., Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1117 (4th Cir. 1988) (holding that an association with a nonprofit organization that ended a decade before adversary proceedings

commenced does not form a reasonable basis for questioning the trial judge's impartiality even though the nonprofit was a party to the litigation); cf. Veneklase v. City of Fargo, 236 F.3d 899, 901 (8th Cir. 2000) (finding recusal unnecessary where judge's former law firm had represented parties tangentially involved in civil rights suit); United States v. Story, 716 F.2d 1088, 1090 (6th Cir. 1983) (finding recusal unnecessary where judge had represented victim in civil matter thirteen years earlier).

Contrary to the plaintiffs' importunings, our decision in Boston's Children First does not require a different result. There, we ordered recusal not because of the judge's past association with civil rights organizations but, rather, because the judge had made contemporaneous extrajudicial statements about a pending case. Boston's Children First, 244 F.3d at 169-70. Here, the judge's passing comment that LCCR was eligible to apply for amicus status is a far cry from the statements that engendered our ruling in Boston's Children First. That comment constitutes a wholly insufficient basis on which to order recusal.

To be sure, the plaintiffs lodge a claim of bias. On close examination, however, this is more cry than wool. The only indicium of bias to which they allude revolves around their perception of the judge's abstract policy preferences. That subjective apprehension, standing alone, is too weak a reed to warrant appellate interference with the district judge's recusal

decision. Our judicial system would be paralyzed if judges were subject to disqualification on so ephemeral a basis. See Camacho, 868 F.2d at 491. We therefore uphold the order denying the motion for recusal.

V. CONCLUSION

We need go no further. For the reasons elucidated above, we hold that the achievement of racial diversity can be a constitutionally permissible interest in the context of K-12 education. Nevertheless, the use of racial distinctions always should be a last resort. Here, the School Committee has failed to show that a racially restrictive formula was necessary to achieve its legitimate goal. Because the transfer provisions of the Lynn Plan fail to satisfy the narrow-tailoring requirement set out in the Supreme Court's equal protection jurisprudence, those provisions are unconstitutional and their further use must be enjoined. Consequently, we reverse the district court's ruling upholding the disputed transfer provisions, affirm the ruling denying the motion for recusal, vacate the judgment below, and remand for further proceedings consistent with this opinion. Without limiting the foregoing, we direct the court, on remand, to enter a revised judgment granting appropriate declaratory and injunctive relief to the plaintiffs.

The decision on the merits is reversed, the denial of the motion to recuse is affirmed, the judgment below is vacated, and the case is remanded for further proceedings. Costs shall be taxed in favor of the plaintiffs.